ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Ameritech for Forbearance from	)	CC Docket No. 98-65
Enforcement of Section 275(a) of the	)	
Communications Act of 1934, as Amended	)	

COMMENTS OF THE ALARM INDUSTRY COMMUNICATIONS COMMITTEE

THE ALARM INDUSTRY COMMUNICATIONS COMMITTEE

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SUMMARY

Having failed to convince the Court of Appeals that Section 275(a)(2) permits Ameritech to purchase independent alarm monitoring providers, Ameritech has filed its Petition for Forbearance in an attempt to delay the Commission's rulings in the pending enforcement actions against Ameritech. Thus, finally admitting that its alarm monitoring acquisitions violate Section 275(a)(2), Ameritech argues that Congress simply was wrong to enact the statute and the Commission should repeal it. The Commission cannot accept Ameritech's invitation to misread Section 10 as an empowerment to overrule Congress in the absence of changed circumstances.

The same evidence and arguments set forth by Ameritech in its Petition to the Commission also were presented to Congress prior to its enactment of Section 275(a)(2). Congress rejected those contentions and concluded that a five-year, nationwide moratorium on Ameritech acquisition of alarm companies is in the public interest in order to preserve competition by guarding against discriminatory and anticompetitive activity by Ameritech. Section 10 does not give the Commission power to overrule this determination.

Indeed, Ameritech fails to demonstrate any change in circumstances that would suggest Section 275(a)(2) is no longer necessary. Instead, it seeks a direct FCC reversal of the congressional judgment, an empowerment which was not intended by Section 10 (and which would be an unconstitutional violation of the separation of powers if it were).

Ameritech also fails to demonstrate compliance with any part of the three prong test for forbearance set forth in Section 10. If anything, Ameritech's Petition underscores the fact that Congress' purpose in enacting Section 275(a)(2) has not been realized. Section 275(a)(2) remains necessary to serve its intended purpose of safeguarding against discriminatory behavior by Ameritech and protecting consumers, including independent alarm monitoring providers held

captive by Ameritech's unrelenting monopoly control over bottleneck services, from the effects of such anticompetitive behavior.

Moreover, enforcement of Section 275(a)(2) remains in the public interest: (1) it safeguards competition in the alarm industry from anticompetitive abuses by companies that retain monopoly control over essential components of alarm monitoring service; (2) it (should) prevent Ameritech from expanding through acquisition and thereby magnifying the potential and incentive for that company to engage in anticompetitive conduct; and (3) it (should) maintain the status quo vis-à-vis Ameritech and its RBOC siblings who must wait until February 8, 2001 to enter the alarm monitoring market. Ameritech's recent and unlawful alarm monitoring consolidation spree, despite efficiencies that may or may not be gained from its temporary state of largess, does not counter any of these arguments. Moreover, it simply would be bad public policy to reward a company by forbearing from enforcing a statute with which it baldly refuses to comply.

The Commission should not reward Ameritech's attempts to delay enforcement of Section 275(a)(2) any further. Thus, AICC recommends that the Commission:

(1) promptly deny Ameritech's Petition to Forbear;

(2) promptly grant AICC's now nearly two-year-old series of emergency motions for enforcement of Section 275(a)(2) against Ameritech; and

(3) order Ameritech to divest its illegally acquired alarm monitoring assets immediately.

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COMMENTS OF THE ALARM INDUSTRY COMMUNICATIONS COMMITTEE

Pursuant to the Commission's Public Notice released in the above-captioned docket on May 20, 1998,[1] the Alarm Industry Communications Committee ("AICC"), by its attorneys, hereby submits these comments on Ameritech Corporation's ("Ameritech") Petition for Forbearance from Enforcement of Section 275(a) of the Communications Act of 1934, as amended ("Petition").

Introduction

Having failed to convince the United States Court of Appeals for the District of Columbia Circuit that Section 275 of the Communications Act of 1934, as amended ("Act"), should be interpreted as it contends,[2] Ameritech now argues that Congress simply was wrong to enact Section 275(a) and the Commission should not, and indeed, cannot enforce it. Thus, based upon the same evidence and arguments presented to Congress, Ameritech asks the Commission to second guess and override the conclusions

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1 CC Docket No. 98-65, DA 98-965.

2 *Alarm Industry Communications Committee v. FCC,* 131 F.3d 1066 (D.C. Cir. 1991).

reached by Congress in enacting Section 275(a). Section 10 clearly cannot bear the weight that Ameritech puts on it.

Congress enacted Section 10 in order to give the Commission flexibility to forbear from enforcing regulations or provisions of the Act that have outlived their usefulness and are no longer necessary to ensure competition in the provision of telecommunications services.[3] Thus, a demonstration of changed circumstances is a condition precedent to any exercise of forbearance authority by the Commission. Ameritech has made no attempt to demonstrate any changed circumstances unforeseen or accounted for by Congress at the time it enacted Section 275(a). Moreover, Ameritech has made no attempt to demonstrate why Congress' chosen effective period for Section 275(a) – five years – should not run its course. Rather, Ameritech argues that Section 10 gives the Commission authority to reconsider the congressional conclusions underpinning Section 275(a). Section 10 contains no such extreme and patently unconstitutional delegation of legislative authority.[4] Congress cannot and did not delegate to the Commission the authority to rewrite Section 275(a). Yet, absent changed circumstances, this is what Ameritech improperly asks the Commission to do. Fortunately, Section 10 sets forth a three part through which Commission can avoid such an impropriety.

The three part test set forth by Congress in Section 10 requires the Commission to premise forbearance on a finding that enforcement of the statute no longer is necessary to

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3 Section 10 is entitled "Competition in the Provision of Telecommunications Service". 47 U.S.C. § 160.

4 Even without Ameritech's creative, but unfounded, spin, AICC believes that Section 10 is of questionable constitutionality. AICC expressly reserves the right to brief this issue if an appeal becomes necessary in this proceeding.

(1) guard against nondiscriminatory behavior, (2) protect consumers, and (3) further the public interest. Inherent in each prong of this test is a congressional charge that the Commission find that enforcement of the statute is no longer necessary because the goals set forth therein already have been achieved.

Clearly, Congress' purpose in enacting Section 275(a) has not been realized. As part of the pro-competitive framework of the 1996 Act, Section 275(a) is intended to promote competition in the alarm monitoring market by guarding against distortions that could result from the entry of the RBOCs whose monopoly control over local bottleneck facilities gives them the unique ability and incentive to engage in discriminatory and anticompetitive behavior at the expense of independent alarm monitoring entities operating both within and outside the RBOCs' individual service territories. Consistent with this purpose, Congress also provided in Section 275(a) that (1) although Ameritech would not be required to divest its alarm monitoring assets, in order to limit Ameritech's potential for and incentive to engage in anticompetitive activity, Ameritech would be prohibited from growing its alarm monitoring business through acquisitions, and (2) the provisions of that section would sunset five years after the date of enactment of the 1996 Act. The latter provision reflects Congress' conclusion that, over the course of five years' time, the RBOCs' monopoly control over bottleneck facilities should dissipate sufficiently to alleviate concerns with respect to the RBOCs' ability and natural incentive to use their control over local bottleneck facilities in anticompetitive ways.

Nevertheless, the fundamental question that must be answered by the Petitioner is not whether Congress reached the wrong conclusions in enacting Section 275(a), but whether Ameritech's monopoly over local bottleneck facilities dissipated at an

unexpected and accelerated pace that warrants advancement of the five year sunset provision contained in the statute? The Petition does not even address this issue. Indeed, Ameritech admits that it retains a monopoly over bottleneck local services.[5] If anything, the anticipated dissipation of Ameritech's local monopoly stranglehold has been unexpectedly slow and would suggest that the five year sunset provision contained in Section 275(a) should be extended rather than cut short.

In light of the lack of progress made by Ameritech in opening its local exchange markets to competition,[6] Section 275(a) remains necessary to serve its intended purpose of safeguarding against discriminatory behavior by Ameritech and protecting consumers, including independent alarm monitoring providers who are held captive by Ameritech's control over bottleneck services, from such anticompetitive behavior. Moreover, enforcement of Section 275(a) remains in the public interest: (1) it safeguards competition in the alarm industry from anticompetitive abuses by companies that retain monopoly control over essential components of alarm monitoring service; (2) it (should) prevent Ameritech from expanding through acquisition and thereby magnifying the potential and incentive for that company to engage in anticompetitive conduct; and (3) it (should) maintain the status quo vis-à-vis Ameritech and its RBOC siblings who must wait until February 8, 2001 to enter the alarm monitoring market. Ameritech's recent and unlawful alarm monitoring consolidation spree, despite efficiencies that may or may not

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5 *See, e.g., Petition,* at 15.

6 *See generally, Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide in-Region, InterLATA Services In Michigan,* CC Docket No. 97-137, Memorandum Opinion and Order, (rel. Aug. 19, 1997) [hereinafter *"Ameritech-Michigan Section 271 Order"*].

be gained from its temporary state of largess, does not counter any of these arguments. Moreover, it simply would be bad public policy to reward a company by forbearing from enforcing a statute with which it baldly refuses to comply.

In sum, Ameritech's reading of Section 10 renders that section patently unconstitutional. Congress could not have delegated to the Commission the power to "correct" legislation which Ameritech believes was wrongly enacted. As Ameritech has stated time and again in its ongoing battle with AICC, Section 275(a) represents a congressional compromise. Vis-à-vis the other RBOCs, it is a compromise from which Ameritech benefited greatly. To be sure, Section 275(a) would read differently if written solely by Ameritech or AICC. However, the fact of the matter is that Congress wrote it and until it expires or Congress is persuaded to rewrite it – it is the law of the land. Ameritech did not and cannot demonstrate that the Section 10 standard for forbearance has been met. Accordingly, its petition must be denied.

I. AMERITECH HAS FAILED TO DEMONSTRATE CHANGED CIRCUMSTANCES THAT WOULD MERIT FORBEARANCE

Although Ameritech's Petition easily should be rejected based on a simple run-through of the three-prong test for forbearance set forth in Section 10, AICC is compelled to address several overarching and critical points raised by Ameritech's Petition. A discussion of these general points exposes the constitutional infirmity as well as the policy shortcomings of Ameritech's proposal and is set forth below. AICC's response to Ameritech's misguided and disingenuous analysis of Section 10's forbearance requirements follows in the next section of these comments.

A. If Section 10 Allows the Commission to Grant Ameritech's Petition, It Must Be an Unconstitutional Delegation of Legislative Authority

Despite Ameritech's contentions, Section 10 does not give the Commission authority to invalidate the conclusions of Congress by forbearing based on the its own posterior determination that Congress simply got it wrong.[7] Ameritech goes to great lengths to explain how the Department of Justice and two federal courts once were convinced to grant Ameritech a waiver of the MFJ's line of business restrictions so that Ameritech could provide interLATA alarm monitoring services.[8] However, as Ameritech itself noted:

> *Notwithstanding the findings that DOJ and the Court of Appeals* regarding the BOCs' lack of ability to engage in undetected subsidization or discrimination against competing providers of alarm monitoring services, as a political compromise *Congress enacted Section 275(a) as part of the Telecommunications Act of 1996.*[9]

Simply put, Congress can do that.[10] And, it had good reasons for doing so. Indeed, Ameritech paraded its argument before Congress and failed to convince the legislators that a monopolist could be trusted to make good on promises not to use its control over bottleneck facilities in anticompetitive ways.

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7 *See Ameritech Petition,* at 5, 24-27.

8 *Id.* at 3-5. The irony in Ameritech asking the Commission to consider the wisdom of Judge Greene as the basis for a Commission order repealing Congress' action in enacting Section 275(a)(2) should not go unnoted.

9 *Id.* at 5 (emphasis added).

10 Article 1 of the Constitution gives Congress sole authority to legislate. U.S.C.A. Const. Art. 1.

Section 275(a) also contains a five year sunset provision which reflects Congress' determination that, over the course of five years' time, the RBOCs' monopoly control over bottleneck facilities should dissipate sufficiently to alleviate concerns with respect to the RBOCs' ability and natural incentive to use their control over such facilities in anticompetitive and discriminatory ways.

Having been forced to accept a compromise,[11] Ameritech now seeks to rejoin the debate over how Section 275(a) should be written by asking the Commission to overrule Congress. However, Congress already has concluded the debate that guided the drafting and eventual passage of Section 275(a) and Section 10 does not give the Commission authority to reconsider the congressional conclusions underpinning that – or any other – section of the Act. Indeed, Section 10 merely was intended to give the Commission flexibility to forbear from enforcing regulations or provisions of the Act that have outlived their usefulness and are no longer necessary to address the conclusions and realize the goals that Congress sought to achieve by enacting them.[12] Plainly, if there is any possibility that Section 10 forbearance authority can be exercised in a constitutional way, such forbearance must be premised on a well substantiated case of changed circumstances. Otherwise, if Section 10 simply allowed the Commission to review, invalidate or correct Section 275 – or any other legislation, it surely would run afoul of the principle of separation of powers that is embedded in the Constitution.[13]

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11 *Ameritech Petition*, at 5.

12 Section 10 essentially was a response to the Commission's unsuccessful attempts to forbear from requiring tariffs from nondominant carriers when FCC review had been rendered unnecessary due to market constraints on such carriers.

13 U.S.C.A. Const. Arts. 1-3.

The Supreme Court long has held that Congress may not delegate the power to legislate to another branch of the government, including the executive branch of which the Commission is a part.[14] Yet, because Ameritech has made no attempt to demonstrate any changed circumstances unforeseen or accounted for by Congress at the time it enacted Section 275(a), Ameritech's Petition stands as nothing more than a request for the Commission to re-legislate and overrule Congress. AICC also submits that because Section 275(a) contains an express sunset provision, it is unlikely that Congress contemplated that the Commission might be asked to shorten the effective period of the provision through the use of its newly granted forbearance authority or that the Commission could use its forbearance authority in a way that did not render Section 10 unconstitutional.

While AICC recognizes that the Commission similarly does not have authority to determine the constitutionality of Section 10, it respectfully submits that well established maxims of statutory construction require that the Commission not interpret or apply Section 10 in a way that renders it unconstitutional.[15] Thus, the Commission prudently should reject Ameritech's Petition and avoid the trap Ameritech set in asking it to overrule Congress.

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14 *See, e.g., Loving v. United States,* 116 S.Ct. 1737, 1750 (1996) ("Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes"); *A.L.A. Schecter Poultry Corp. v. United States,* 295 U.S. 495, 529 (1935) ("Congress is not permitted to abdicate or transfer to others its essential legislative functions").

15 Sutherland Statutory Construction, 5th Ed. Text and Commentary, Vol. 2A, § 45.11 ("When possible, statutory provisions should be construed in such a way as to avoid unconstitutionality rather than simply void them on the basis of an interpretation that renders them constitutionally infirm.").

B. Despite Ameritech's Overt Attempt to Confuse and Mislead the Commission, Section 275(a) Is Intended to Address Ameritech's – and Not SecurityLink's – Ability and Incentives to Use Its Control Over Bottleneck Facilities in an Anticompetitive Manner

In its effort to convince the Commission that Congress was wrong to enact Section 275(a) and that enforcement of the Section is not necessary to ensure that Ameritech will not engage in discriminatory behavior against independent alarm monitoring providers, Ameritech goes to great lengths to confuse and mislead the Commission on the issue of whether or not it has the ability to discriminate. It does this predominantly by painting a picture of how its SecurityLink subsidiary is but a small competitor (that nevertheless can take advantage of unsubstantiated and large-scale "efficiencies" as a direct result of its unlawful string of multimillion dollar acquisitions) in the alarm monitoring industry that is unable to discriminate.[16] Then, as though SecurityLink's mere number two ranking in the alarm monitoring business could somehow justify overlooking its parent company's monopoly over bottleneck local telecommunications facilities, Petitioner repeatedly makes the bald and utterly unfounded claim that Ameritech could not engage in unjust or unreasonably discriminatory practices against competitors.[17]

Miraculously Ameritech makes this claim while acknowledging that it retains "its local exchange monopoly".[18] Predictably, Ameritech contradicts itself on its claim that it

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16 *Ameritech Petition,* at 2 and 11-12.

17 *Id.* at 2 and 12 ("Nor could Ameritech engage in unjust or unreasonably discriminatory practices against competitors.").

18 *Id.* at 15; *but see id.* at 19 (Petitioner refers to "Ameritech's lack of market power", apparently trying to translate SecurityLink's alarm monitoring market (continued...)

could not and would not discriminate at several points in its Petition. First, Ameritech presumes that statutory safeguards and enforcement provisions such as Sections 275(b) and (c) render it unable to discriminate, cross-subsidize or act in anticompetitive ways.[19] However, the very existence of these sections indicates that Congress concluded that Ameritech *could* use or leverage its control over local bottleneck facilities in anticompetitive ways that would distort or damage the otherwise effectively functioning and fully competitive market for alarm monitoring services.[20]

Second, Petitioner itself describes the possibility that:

> Ameritech might perceive a benefit to degrading signals of competing alarm companies and then attempting to enroll their customers if it had no other way to grow on a large scale. But *if this forbearance petition were granted and Ameritech were permitted to engage in large scale growth through equity or asset acquisitions,*[21] it would be unnecessary and foolhardy to attempt to grow through discriminatory practices . . . [t]he risks and costs of a

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(...continued)
share into a conclusion that Ameritech somehow lacks market power despite its vigilantly defended stranglehold over local bottleneck facilities).

19 *Id.* at 12-13.

20 As has now become standard, Ameritech states that "it is telling that . . . there have been no allegations that Ameritech has even tried to misuse its local exchange monopoly to harm either consumers or alarm monitoring competitors." *Id.* at 15. Once again, it does so without stating why "it is telling". AICC believes that it is telling that Congress was not persuaded by this point when it passed Section 275. The fact that Ameritech claims no such allegations have been made against it since Section 275 became law suggests that the provision, at least in some respects, is having its intended effect.

21 Here, and at several other points in its Petition, Ameritech tacitly admits that its alarm monitoring acquisitions were unlawful. In fact, Ameritech's entire Petition is premised on an admission that it repeatedly has violated the restrictions of Section 275(a). Accordingly, AICC requests that the Commission promptly grant AICC's motions in each of the pending enforcement actions against Ameritech, as Ameritech no longer appears to deny AICC's core statutory claim in those proceedings. *See also id.* at 26 (Ameritech refers to "Section 275(a)'s exclusion of Ameritech from external growth").

> discrimination strategy would be high and the likelihood of success would be infinitesimally small, so the benefits (compared to growth through acquisition) would be nonexistent.[22]

In other words, Ameritech posits that if the Commission does not forbear from enforcing Section 275(a) against Ameritech in the Circuit City remand proceedings and other enforcement actions pending before the Commission, it would give Ameritech no alternative or, at the very least, an enhanced incentive to grow through the use of discriminatory practices.[23] However, through Section 275(a), Congress already has determined that the converse is true. Congress proscribed Ameritech's ability to grow throw acquisitions because the larger Ameritech's alarm monitoring business gets, the greater are its opportunities and incentives to enhance its growth through the use of anticompetitive practices related to its local services monopoly.

Third, Ameritech suggests that, even if it were to discriminate, it really would not be too bad. Floating free from any statutory foundation, Ameritech makes an unsubstantiated claim that *"it does not possess the technical capability to engage in a systemic pattern of discrimination"* or at least doing so "would be especially difficult to

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22 *Id.* at n.24 (emphasis added). Ameritech opens its note with the unsubstantiated claim that "AICC has never spelled out how Ameritech could successfully discriminate against alarm monitoring competitors." Oddly, Ameritech then proceeds to give a perfect example of one of the many ways in which Ameritech's control over local bottleneck facilities gives it the ability and incentive to act against independent alarm monitoring competitors and customers in anticompetitive ways.

23 Recognizing that it would be imprudent to even give the appearance of threatening to engage in discriminatory and anticompetitive behavior if the relief requested in its petition is not granted, Ameritech qualifies its proposition with the phrase "[t]heoretically and only theoretically". *Id.*

accomplish".[24] In any event, Ameritech suggests that it has agreed to performance reporting standards with this Commission and the State commissions that would render such discrimination easily detectable.[25] This claim, too, is made without a shred of supporting evidence. Indeed, earlier this month, Ameritech filed comments in CC Docket No. 98-56 emphatically stating that the Commission has *no jurisdiction* to impose performance measurement and reporting requirements on Ameritech.[26] Ameritech also offers that *"the likelihood that it would benefit from such discrimination is remote"*.[27] Aside from being plainly wrong, this, too, appears to be an unsubstantiated claim in search of some statutory basis or relevance.

Fourth, Ameritech (still searching for a statutory standard) appears to argue that because Ameritech would have to discriminate in a way "so subtle as to evade detection", it could not do so in a way that "caused large numbers of customers to switch from other alarm monitoring firms to [SecurityLink]" and, thus, Ameritech's discriminatory behavior "could not succeed in impeding competition".[28] This argument, too, appears to be as irrelevant as it is absurd and unsubstantiated.

In sum, Ameritech's effort to obfuscate cannot be rewarded. Congress enacted Section 275(a) because it concluded that the danger of Ameritech using its monopoly control over essential bottleneck facilities in discriminatory and anticompetitive ways

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24 *Id.* at 18 (emphasis added).

25 *Id.*

26 *Ameritech's Initial Comments in Response to Notice of Proposed Rulemaking,* CC Docket No. 98-56 (filed June 1, 1998) at 3 ("Congress assigned the Commission no role in this area at all.").

27 *Ameritech Petition,* at 19.

28 *Id.* at 20.

against independent alarm monitoring providers is "real . . . not theoretical."[29] Section 10 does not, as Ameritech appears to contend, give the Commission authority to reconsider the propriety of that determination.

C. Nothing in Section 10 Indicates That Congress Attempted to Give the Commission Authority to Forbear Retroactively

Ameritech states in its Petition that "[t]he requested forbearance would apply both to alarm monitoring service transactions already completed and to future transactions by Ameritech."[30] However, Ameritech provides no argument setting forth the Commission's authority to grant forbearance retroactively. Indeed, there is no such authority. Nothing in Section 10 even suggests that the Commission retroactively can forbear from enforcing Section 275(a). Thus, AICC submits that, in the inconceivable event that the Commission were to grant Ameritech's Petition, such a grant could not include a pardon for Ameritech's violations of Section 275(a) that occurred prior to the date on which the Commission's decision was released.

II. AMERITECH CANNOT DEMONSTRATE COMPLIANCE WITH THE THREE PART TEST FOR FORBEARANCE SET FORTH IN SECTION 10

In response to the tortured history surrounding the Commission's attempt to forbear from enforcing the mandatory tariffing requirement of Section 203 on nondominant carriers, Congress sought in Section 10(a) to give the Commission "regulatory flexibility" by requiring the Commission to forbear from applying any

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29 *See* H.R. Rep. No. 104-204, 104th Cong., 1st Sess., 87 (1995); S. Rep. No. 104-450, 104th Cong., 2d Sess., 157 (1996).

30 *Ameritech Petition,* at 1.

regulation or provision of the Act, if the Commission determines that the criteria of Section 10(a) are met. Thus, even if the Commission were to accept the premise that it could forbear from enforcing Section 275(a) – despite the absence of any indication of changed circumstances since the Act was amended to include that section, Ameritech must still demonstrate that:

(1) enforcement of Section 275(a) is not necessary to ensure that Ameritech's charges and practices are just, reasonable and nondiscriminatory;

(2) enforcement of Section 275(a) is not necessary for the protection of consumers; and

(3) forbearance from enforcing Section 275(a) is consistent with the public interest.

As demonstrated below, Ameritech's Petition fails to demonstrate compliance with any of these criteria.

A. Enforcement of Section 275(a) Is Necessary to Ensure That Ameritech Does Not Subject Independent Alarm Monitoring Providers to Discriminatory Charges and Practices

As has been discussed above in Section I.B., Ameritech has gone to great lengths to confuse and mislead the Commission with regard to its ability to engage in discriminatory conduct against independent alarm monitoring providers. When Congress enacted Section 275(a) it determined that the section was indeed necessary to safeguard against discrimination by the RBOCs and Ameritech in particular. This congressional judgment now stands as a presumption that Ameritech must rebut, if it is to meet the first of the three Section 10 criteria. However, far from doing that, Ameritech has provided a number of fine examples (discussed above) why Congress had good reason to be

concerned about Ameritech's unique ability and incentives to use or leverage its control over local bottleneck facilities in favor of its SecurityLink subsidiary and at the expense of independent alarm monitoring providers.[31]

Ameritech's claim that it satisfies the first prong of the Section 10 test because its SecurityLink subsidiary "has less than a 7% market share nationally"[32] that "does not exceed 10%"[33] is both confusing and distracting but certainly is not relevant.[34] Congress did not enact Section 275 directly out of its concern that *SecurityLink* might exercise market power resulting from control over bottleneck local telecommunications facilities. Rather, Section 275 has its foundation in a concern that *Ameritech* could use its market power and control over bottleneck facilities in discriminatory and anticompetitive ways.

Thus, despite Ameritech's efforts to mislead, a discussion of SecurityLink's (rapidly increasing) market share does not lead to Ameritech's conclusion that:

> *Ameritech's* lack of market power alone compels the conclusion that enforcement of Section 275(a) "is not necessary to ensure that the charges . . . by, for, or in connection with" *Ameritech's alarm monitoring services* "are just and reasonable and are not unjustly or

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31 *See, e.g., Ameritech Petition,* at n.24.

32 *Ameritech Petition,* at 11.

33 *Id.* at n.15.

34 Although not relevant to the determination that must be made by the Commission, Ameritech's discussion of market share and market power is terribly misguided as it ignores any consideration of what the relevant market might be under antitrust principles. For example, Ameritech itself has less than a 30 percent share of the nationwide local exchange market. Yet, Ameritech probably could not even hire someone to say that it did not have market power within its own service territory. *See id.* at 11, n.14.

unreasonably discriminatory."[35]

As discussed above, it simply is not true that Ameritech does not have market power. In its Petition Ameritech acknowledges as much, but apparently was convinced, nevertheless, that if it focused on *SecurityLink's* market share and if it used the names "SecurityLink" and "Ameritech" interchangeably, it might fool somebody. This gambit simply does not demonstrate compliance with the first prong of the Section 10 test.

Ameritech's transparent attempt to change the statutory test into one that examines SecurityLink's, as opposed to Ameritech's, ability to engage in discriminatory conduct fares no better. Section 10 speaks in terms of telecommunications carriers and services – Ameritech claims that SecurityLink is not a telecommunications carrier.[36] Indeed, Ameritech has made no showing whatsoever that its stranglehold over bottleneck facilities is dissipating, as Congress thought it would.[37] In the absence of such a showing, it cannot be presumed that Ameritech's ability and incentives to engage in the kind of discriminatory conduct that Section 275(a) was intended to guard against have diminished in any way. Ameritech's rash of alarm monitoring acquisitions in direct violation of Section 275(a) suggest that Ameritech's opportunities and incentives for engaging in discriminatory conduct against independent alarm monitoring providers only has increased in the 28 months that have passed since Section 275(a) became law. Thus, it also cannot be presumed that the five year effective period of Section 275(a) can be

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35 *Id.* at 13 (emphasis added).

36 *See id.* at 12.

37 The Commission's denial of Ameritech-Michigan's Section 271 application suggests that Ameritech currently is unable to make such a showing. *See generally, Ameritech-Michigan Section 271 Order.*

shortened or that Section 275(a) no longer is necessary to safeguard against discriminatory conduct by Ameritech against independent alarm monitoring providers.

B. Enforcement of Section 275(a) Is Necessary for the Protection of Consumers

There is nothing in Ameritech's Petition that overcomes the congressional determination that Section 275(a) is necessary for the protection of consumers.[38] Indeed, the only relevant factual changes that have taken place since Section 275(a) became law suggest that enforcement of Section 275(a) is needed to protect consumers now more than ever. Although Ameritech's Petition virtually ignores this fact, independent alarm monitoring entities are a class of consumers intended to be protected by Section 275(a). As Ameritech unlawfully grows its SecurityLink alarm monitoring subsidiary through acquisitions, Ameritech's opportunities and incentives to engage in anticompetitive conduct intended to harm independent alarm monitoring providers who have no choice but to be consumers of Ameritech's monopoly local services also grows.

Moreover, Ameritech's claim that enforcement of Section 275(a) is unnecessary because "market forces are working" is utterly baseless. Ameritech's Petition contains

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38 Again, Ameritech tries to divert the Commission's focus from the relevant issues by focusing on *SecurityLink's* – and not *Ameritech's* – ability to soak consumers. Even in this, Ameritech's analysis is misguided. Its Petition goes to great lengths to show how its rash of unlawful alarm monitoring acquisitions has given SecurityLink economies of scale that have saved it and its parent, Ameritech, large sums of money, but there is no evidence of how this has translated into benefits for consumers of those services, nevertheless, for consumers of Ameritech's telecommunications services. Indeed, if Ameritech continues buying SecurityLink's competitors, there is little reason to believe that prices for SecurityLink's services will not increase in markets where SecurityLink has acquired substantial market share.

absolutely no evidence that Ameritech's stranglehold over bottleneck local facilities has loosened at all. In fact, Ameritech has stymied the entry of competitive local exchange companies that independent alarm monitoring providers could turn to for service. For the time being, independent alarm monitoring providers must remain Ameritech's customers and competitors.

Following Ameritech's baseless claim that enforcement of Section 275(a) is no longer necessary to protect consumers because "market forces are working", Ameritech also states that:

> Further protection of consumers and competitors alike in the highly unlikely event of demonstrated anticompetitive behavior by Ameritech is provided by the Commission's ability to reimpose the restrictions of Section 275(a).[39]

First, since the prologue to this statement is baseless, it remains eminently clear that enforcement of Section 275(a) remains necessary to protect consumers. Second, the statement itself is wholly disingenuous. The effective period for Section 275(a) is nearly half expired. It has been 22 months since AICC filed its first enforcement action against Ameritech. With less than 32 months remaining before Section 275(a) sunsets, by its own terms, it seems highly unlikely that the Commission would have the time or resources to forbear and then reinstate Section 275(a) before it expires. In fact, Ameritech almost certainly could use litigation to prevent any possibility of that happening.

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[39] *Ameritech Petition,* at 16.

C. Forbearance from Enforcing Section 275(a) Is Not Consistent with the Public Interest

Ameritech has not met its burden of showing that forbearance from enforcing Section 275(a) is consistent with the public interest. Here, too, Ameritech attempts to persuade the Commission to ignore two important facts: (1) little has happened to diminish Ameritech's monopoly control of local bottleneck facilities since Section 275(a) became law; and (2) nothing has happened to diminish congressional concerns that Ameritech might use its control of those facilities in anticompetitive and discriminatory ways.[40] It plainly would not be consistent with the public interest for the Commission to ignore either of these facts in considering Ameritech's Petition. Moreover, it is unlikely that shortening the effective period of a statute in which Congress specifically incorporated a sunset provision can be lawful or consistent with the public interest. If there is a case to be made to refute this, Ameritech's Petition certainly does not make it.

The case Ameritech does make in support of its claim that forbearance form enforcing Section 275(a) is consistent with the public interest is singularly noncompelling. Ameritech relies almost exclusively on the benefits it derives from having completed a string of alarm monitoring acquisitions that *violate* Section 275(a) as the basis for its claim that forbearance from enforcing that section is consistent with the public interest.[41] In other words, Ameritech (1) claims that Congress was wrong to enact

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40 A dissipation of Ameritech's ability to act anticompetitively can be assumed only if some other fundamental change has occurred in the 28 months since Congress enacted Section 275(a). *See United States v. Western Electric,* 673 F.Supp. 525, 546 (D.D.C. 1987).

41 *Ameritech Petition,* at 21-25.

Section 275(a),[42] (2) admits that it violated Section 275(a) several times,[43] and (3) argues that it is in the public interest to ignore its infractions because Ameritech has realized amazing economies of scale as a direct result of its multiple violations of the statute.[44] If the Commission did anything short of condemning this rationale, it would establish a shocking precedent.

Ameritech also drags out its familiar argument that Section 275(a) should be ignored because its monopoly currently is limited to five states. It bears repeating that Congress thought differently.[45] Once again, Ameritech has presented no evidence of changed circumstances that can be used to create a plausible argument for reassessing Congress' conclusions. As Ameritech notes, Congress clearly knew how to free Ameritech and the other RBOCs from out-of-region restrictions. It chose not to do so in

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42 *See id.* at 24-25.

43 *Id. passim* (AICC believes that Ameritech's Petition constitutes an admission that it made its alarm monitoring acquisitions in violation of Section 275(a)).

44 *Id.* at 21-25.

45 There are numerous reasons why Congress did not limit Section 275(a) on a geographic basis. For example, it would be practically and technically difficult to enforce a distinction between in-region and out-of-region alarm monitoring. Ameritech's alarm monitoring acquisitions have had accounts and facilities both in and outside Ameritech's monopoly service territory. Newly acquired accounts outside that service territory might depend on facilities inside Ameritech's service territory or vice-versa. That uncertainty would facilitate violations and evasions of the geographic barrier. In short, if Congress had put a geographic limitation on Section 275(a)'s restrictions, the Commission would be awash in additional disputes regarding the demarcation established. In addition, because the alarm monitoring industry is a national one, Ameritech's ability and incentive to engage in anticompetitive and discriminatory behavior could have effects on competitors' operations across the country. For example, if an independent alarm monitoring entity were forced to divert resources and expend additional capital to combat anticompetitive activity by Ameritech in Illinois, it might force the competitor to raise prices nationally, which may result in Ameritech securing a cost/price advantage for its SecurityLink subsidiary in markets far outside Ameritech's monopoly service territory.

Section 275(a).[46] In short, whether forbearance is in the public interest does not turn on Ameritech's view that nationwide prohibition contained in Section 275(a) "makes no policy sense". Rather, the public interest requires that Section 275(a) must remain in place in its entirety because it made sense to Congress and Ameritech has not demonstrated any changed circumstances that might have led Congress to conclude otherwise.

III. THE COMMISSION SHOULD NOT COUNTENANCE AMERITECH'S EFFORTS TO DELAY ENFORCEMENT OF SECTION 275 BY GRANTING ITS REQUEST FOR CONSOLIDATION

Ameritech's Petition is merely the latest in long series of actions designed to delay Commission action in the *Circuit City* remand proceeding and other related Section 275 enforcement dockets. Although meritless, Ameritech's Petition raises new issues that should be decided separately from those raised in the pending enforcement dockets. The fact that Section 10 does not give the Commission the authority to forbear retroactively also suggests that this docket should not be consolidated with the pending enforcement dockets. The Commission also should remain mindful that Section 275(a)'s five-year effective period already has run nearly half its course. Additional delay could reward Ameritech by mooting Commission enforcement efforts and divestiture proceedings. Neither congressional intent nor the public interest would be served by

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[46] Ameritech ignores the fact that while it an other RBOCs may provide out-of-region interLATA services, they cannot provide them in-region prior to demonstrating compliance with Section 271. Since Section 275(a) already permits Ameritech to provide alarm monitoring services in-region, the comparison is inapposite.